82-5637

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM BERRY, APPELLANT

V.

COMMONWEALTH OF PENNSYLVANIA, APPELLEE

On Appeal From The Supreme Court Of Pennsylvania (Pennsylvania Supreme Court No. 680 E.D. Misc. Docket, 1981; Pennsylvania Superior Court No. 1564, Philadelphia, 1980; Philadelphia Common Pleas Court Information 1307, August Term, 1979).

JURISDICTIONAL STATEMENT

JOHN W. PACKEL, Assistant Defender
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I. QUESTIONS PRESENTED

1. Is Not Pennsylvania'a Rape Shield Statute, 18 Pa.C.S.A. §3104, Unconstitutional As Applied, Under The Federal Constitution Where, As Here, An Accused Is Denied Limited Relevant Critical Confrontation And Cross-Examination Of An Alleged Rape Victim In An Attempt To Refute The Inference Exploited By The Government That The Defendant Was Responsible For The Seminal Fluid Found In The Complainant's Vagina During A Medical Examination Hours After The Alleged Incident?

2. Was Not Appellant Denied Due Process Of Law And The Right To Present A Defense, As Guaranteed By The Federal Constitution, When It Precluded The Defense From Offering The Testimony Of Appellant's Wife For The Purpose Of Establishing That She Had Recent Sexual Intercourse With The Appellant To Explain The Origin Of Seminal Stains Found On Appellant's Undershorts When He Was Arrested Shortly After The Alleged Attack And Introduced Into Evidence By The Commonwealth?

II. TABLE OF CONTENTS

		PAGE
I.	QUESTION PRESENTED	1
II.	TABLE OF CONTENTS	2
III.	TABLE OF CITATIONS	3
IV.	OPINIONS IN COURTS BELOW	4
V.	GROUNDS ON WHICH JURISDICTION IS INVOKED	5
VI.	STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN APPEAL	6-7
VII.	STATEMENT OF THE CASE	9-12
VIII.	THE QUESTIONS PRESENTED ARE SUBSTANTIAL	13-20
	CONCLUSION	20

III. TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

ALFORD V. UNITED STATES
282 U.S. 687, 51 S.Ct. 218 (1931) — 14

DAVIS V. ALASKA
415 U.S. 308, 94 S.Ct. 1105 (1974) — 14,17

DUNN V. UNITED STATES
284 U.S. 390, 52 S.Ct. 189 (1932) — 19

FLOURNEY V. WIENER
321 U.S. 253, 64 S.Ct. 548 (1944) — 20

UNITED STATES V. DOTTERWEICH
320 U.S. 270, 64 S.Ct. 134 (1943) — 19

WASHINGTON V. STATE OF TEXAS
388 U.S. 14, 87 S.Ct. 1920 (1967) — 18

STATE CASES

COMMONWEALTH V. CARTER
444 Pa. 405, 282 A.2d 375 (1971) — 19

SHOCKLEY V. DeLAWDER
28 M.D. App. 212, 344 A.2d 446 (1975) — 17

STATE V. JALO
27 Or. App. 845, 557 P.2d 1359 (1976) — 17

STATE V. LaCLAIR
433 A.2d 1326 (N.H. 1981) — 16

OTHER SOURCES

AMBURG AND RECHTIN, RAPE EVIDENCE REFORM IN MISSOURI. A REMEDY FOR THE ADVERSE IMPACT OF EVIDENTIARY RULES ON RAPE VICTIMS
18 St. Louis Univ. Law J. 367, 386-87 (1978) — 16-17

BERGER, MAN'S TRIAL, WOMAN'S TRIBULATION: RAPE CASES IN THE COURTROOM
77 Col. L. Rev. 1, 57-58, 97-98 (1977) — 17

IV. OPINIONS IN COURTS BELOW

On November 12, 1980, the Honorable Curtis Carson of the Philadelphia Common Pleas Court, who was the trial judge, issued an opinion (unreported) in support of his denial of post-verdict relief, following appellant's taking of a timely appeal to the Superior Court of Pennsylvania. This unreported opinion is attached as Exhibit "A". A panel of the Superior Court of Pennsylvania affirmed appellant's judgment of conviction and sentence by per curiam order and memorandum opinion (unreported) on November 30, 1981, and these are collectively attached as Exhibit "B". Appellant's timely petition for allowance of appeal from the order of the Superior Court was denied on August 30, 1982, and a copy of this order is attached as Exhibit "C".

V. GROUNDS ON WHICH JURISDICTION IS INVOKED

Drawn into question in this case is the constitutional validity of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104, challenged by appellant as being unconstitutional as applied to his case, on grounds of being repugnant to the Sixth and Fourteenth Amendments of the United States Constitution which guarantee an accused the right to confrontation and cross-examination and due process of law. Appellant's judgment of conviction and sentence was affirmed by the Superior Court of Pennsylvania, and on August 30, 1982, the Supreme Court of Pennsylvania entered an order denying appellant's petition for allowance of appeal.

A notice of appeal to this Court was filed in the Supreme Court of Pennsylvania, in the Superior Court of Pennsylvania, and in the Common Pleas Court of Philadelphia on October 26, 1982, and these are attached as Exhibits "D", "E", and "F" respectively.

This appeal is being timely docketed in this Court within 90 days from the Pennsylvania Supreme Court's order of August 30, 1982 denying appellant's petition for allowance of appeal from the Superior Court's affirmance of his judgment of conviction and sentence. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

VI. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN APPEAL

18 Pa.C.S.A. §3104

§3104. Evidence of victim's sexual conduct

(a) General Rule - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) Evidentiary proceedings - A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 Pa.C.S.A. §3121

§3121. Rape

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance of a person of reasonable resolution;

(3) who is unconscious; or

(4) who is so mentally deranged or deficient that such person is incapable of consent.

18 Pa.C.S.A. §3126

§3126. Indecent Assault

A person who has indecent contact with another not his spouse; or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:

(1) he knows that the contact is offensive to the other person;

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;

(3) he knows that the other person is unaware that an indecent contact is being committed;

(4) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance; or

(5) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

Appellant was arrested in his home on August 11, 1979 and charged with rape and related offenses. He was charged with the rape and indecent assault of his twenty five year old stepdaughter ("complainant") in the house shared by her, her children, appellant and his wife ("complainant's" mother). The District Attorney of Philadelphia returned Informations against him at August Term, 1979, after he was held for court following a preliminary hearing.

On January 16, 1980, appellant appeared before the Honorable Curtis C. Carson of the Philadelphia Common Pleas Court on Informations No. 1306 (rape) and 1307 (indecent assault) of August Term 1979 of Philadelphia County. At that time appellant's counsel made a pre-trial motion in limine. The Commonwealth had informed defense counsel that it intended to introduce at trial evidence that the complainant was examined a few hours after the alleged incident and found to have seminal fliud of undetermined origin in her vagina, vulva and cervix, and also that appellant's undershorts were seized at the time of his arrest and found to contain seminal stains. The motion in limine sought to prohibit the introduction of the evidence of the seminal fluid found inside the complainant, or, in the alternative, if such evidence was admitted, to permit the defense to cross-examine the complainant concerning whether she had sexual intercourse with any men other than appellant during the 24 hour period preceding the alleged sexual attack. The issue involved in this appeal was first raised at that time, as appellant contended that 18 Pa.C.S.A.

§3104, which absolutely prohibits such cross-examination, was unconstitutional as applied if defendant was denied the right to conduct this cross-examination of the complainant. Judge Carson ruled that this cross-examination would be prohibited and denied the motion in limine. Following the denial of the motion, trial began before Judge Carson and a jury.

The complainant testified that while sleeping in her bedroom one night with her two children, one of whom was in bed with her, she awoke to find the appellant, her step-father who lived in the same house, in her bed with his penis in her vagina. He then put on his undershorts and left her bedroom; neither child awoke during the alleged incident. She testified that she immediately went out of the house and reported the alleged incident to police, and a policeman responded minutes later and arrested appellant in his bedroom in the house, where he was sleeping in bed with his wife. A policeman testified that he received a report of the alleged incident from the complainant at 12:17 A.M. on August 11, 1979, and that appellant was arrested in bed in his house minutes later.

A microbiologist testified that an examination of specimens taken from the complainant's vagina, vulva and cervix conducted within a few hours of the alleged incident indicated the presence of prostatic seminal fluid, which is only found in males. Dr. Charles Tumosa a criminalist and supervisor of the police chemical lab testified that the seminal fluid found in the complainant could not be identified as having come from any particular male and could have been present for a period of up to 48 hours. The defense

was not permitted to ask the complainant whether she had sexual intercourse with a man other than appellant during the 24 hours time period prior to the alleged incident. Dr. Tumosa also testified that the seminal fluid found in the complainant and the seminal stain and spermatozoa found to be present on the undershorts taken from appellant at the time of his arrest was consistent with a single ejaculation from a male.

The defense was that the alleged incident never occurred. Appellant's wife, Mabel Berry, testified that she had an argument with the complainant (her daughter) before they went to sleep that night, and that she then went to her bedroom where her husband was already asleep in the bed they shared. She was sleeping on the side of the bed nearest the door, and she testified that her husband would have had to crawl over her to get out of the bedroom. She also testified that her sleep had been undisturbed until police came into the bedroom and arrested her husband in bed. When Mabel Berry was asked whether her husband had sexual intercourse with her on August 10, 1979 (within a day of the alleged incident), the prosecutor's objection was sustained, and the judge denied defense counsel a sidebar conference. After due deliberations the jury found appellant not guilty of rape, but guilty of indecent assault. Appellant filed post-trial motions and supplementary post-trial motions* which raised the issues presented by this appeal. These motions

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* Also submitted with supplementary post-trial motions was an affidavit of defense counsel stating that, if permitted, he would have informed the court at the sidebar conference which was denied him that he was attempting to offer the evidence of sexual intercourse between Mabel Berry and appellant to explain the presence of seminal stains found on appellant's undershorts when he was arrested in bed.

were denied on May 12, 1980, and on June 10, 1980, Judge Carson sentenced appellant to one to two years imprisonment on his conviction for indecent assault. A timely appeal was then filed in the Superior Court of Philadelphia, with the case being submitted on briefs. The constitutional invalidity of 18 Pa.C.S.A. §3104, as applied, as well as the other question presented in this jurisdictional statement, were specifically raised in appellant's brief and reply brief filed in the Superior Court. On November 30, 1981, a three judge panel of the Superior Court affirmed appellant's judgment of conviction and sentence.

A timely application for reargument en banc was filed in the Superior Court specifically raising the questions presented by this jurisdictional statement. A timely petition for allowance of appeal was also filed in the Pennsylvania Supreme Court which specifically raised each of the questions presented by this jurisdictional statement. On April 2, 1982 the Superior Court of Pennsylvania denied the application for reargument, and on August 30, 1982, the Pennsylvania Supreme Court denied appellant's petition for an allowance of appeal.

VIII. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. 18 Pa.C.S.A. §3104 Unconstitutional As Applied

This case presents the substantial fundamental question of whether a state, by statute, can absolutely preclude any evidence or cross-examination of an alleged sex crime victim concerning prior sexual intercourse with third persons, even in a case, such as the instant one, where to apply the statute denies the accused critical confrontation and cross-examination of the alleged victim which is necessary to refute an inference which the state is actively seeking to exploit.

In this case, appellant was accused by his adult daughter-in-law of sexually attacking her and having intercourse with her against her will in the house they shared with others, including his wife (her mother). The defense was that the claimed incident never occurred, no intercourse occurred, and that the complainant had fabricated the entire alleged episode. Prior to trial, the Commonwealth informed appellant that it intended to introduce evidence that, when medically examined, within a few hours after the alleged incident, the complainant was found to have seminal fluid in her vagina.

Appellant, in an attempt to refute the inference being sought by the government, that appellant was responsible for the seminal fluid found in the complainant's vagina, requested that he be permitted to cross-examine the complainant concerning whether she had intercourse with any individual other than the defendant during the twenty-four hour period*

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* There was expert testimony at trial that the seminal fluid found in the complainant's vagina could have been present for a period up to forty-eight hours before the examination took place.

preceding the alleged sexual attack. On the basis of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104(a), the defendant was not permitted to conduct such cross-examination. The statute explicitly prohibits such inquiry concerning alleged past sexual conduct between the alleged victim and others, and only permits such evidence or inquiry concerning alleged sexual relations between a defendant and an alleged victims in limited circumstances involving a consent defense.*

Pennsylvania'a rape shield statute, like those in many other states, has the laudatory purpose of protecting alleged victims of sexual attack from embarrassment, humiliation and harassment in the courtroom by barring improper inquiries concerning past sexual conduct. While the goal is laudatory, it is equally clear that such a statute with an absolute ban on any cross-examination or evidence concerning sexual conduct between the alleged victim and third persons will sometimes be applied in a manner which is so unfair as to violate the constitutional rights of the accused.

This Court has in the past made clear that a trial court may not "cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination," as it unanimously reversed a conviction where the defendant was not permitted to ask the prosecution witness where he lived. Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 220 (1931). More recently, in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105

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* The fact that Pennsylvania's rape shield statute law prohibited the proposed cross-examination, and the assertion that the statute as applied to appellant's case would abridge his constitutional rights was raised at all stages of the proceedings, but the Superior Court of Pennsylvania simply ignored the constitutional question presented by rejecting it on the basis that the legislature intended to prohibit such questioning. See Exhibit "B".

(1974), it was held that a state statute designed to protect a juvenile witness from embarrassment and humiliation by prohibiting inquiries at trial concerning his juvenile record of adjudications, had to yield to a defendant's right to conduct limited relevant cross-examination, as this Court concluded "that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." Id. at 319, 94 S.Ct. at 1112.

The cross-examination sought by the defendant was carefully circumscribed and limited to a time period when sexual intercourse by the alleged victim with others would have provided an explanation for the seminal fluid found in the alleged victim's vagina. The prohibition of such relevant cross-examination on the basis of Pennsylvania's rape shield statute meant in practical terms that the Commonwealth was permitted to bolster its case with physical evidence which inferentially corroborated the alleged victim's claim that the defendant had sexual intercourse with her, while the defense was prohibited from conducting cross-examination of the alleged victim in an attempt to rebut this inference.* When a rape shield statute is applied in such a manner it denies a defendant a fair trial, as guaranteed by the due process clause, and an adequate opportunity to confront and cross-examine his accusers, as recognized by other courts

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* Defense counsel's pre-trial motion sought to either bar the introduction of the physical evidence concerning the seminal fluid in the alleged victim's vagina, or to permit the requested limited cross-examination. The lower court therefore, could have prohibited the introduction of the physical evidence rendering the requested cross-examination irrelevant, and thus avoided a constitutional clash between the rape shield statute and the rights of the accused. It was not constitutionally permissible to make the one-sided ruling which the court did, permitting the Commonwealth to introduce its evidence while denying the defendant the relevant proposed defense questioning.

and commentators. If the government offers evidence of a physical condition of an alleged victim in a sex case, such as seminal fluid in the vagina, allegedly caused by the defendant, this Court should hold that the defendant has a right to conduct limited relevant cross-examination of the alleged victim in an attempt* to show a source other than the defendant for the physical condition (e.g. the seminal fluid) that was found to be present. See e.g., State v. LaClair, 433 A.2d 1326 (N.H. 1981); Shockley v. State, 585 S.W. 2d 645, 649-51 (Cr. App. Tenn. 1978); Amburg and Rechtin, Rape

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* The trial judge seemed to view appellant's right to cross-examine the complainant about prior sexual intercourse as dependent on a factual showing that there had, in fact, been prior intercourse. Given the private nature of most instances of sexual intercourse such a showing is obviously almost impossible. More significantly, it is well settled that the right to cross-examine is not conditioned on one's being able to first establish the answers to the proposed questions.

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the court what facts a reasonable cross-examination might develope.
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> * * * * *
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> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219 (1931).

Evidence Reform In Missouri: A Remedy For The Adverse Impact Of Evidentiary Rules On Rape Victims, 18 St. Louis Univ. Law J. 367, 386-87 (1978); Berger, Man's Trial, Woman's Tribulation: Rape Cases In The Courtroom, 77 Col. L. Rev. 1, 57-58, 97-98 (1977). Set also State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976) (In Banc); State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975).

Because Pennsylvania's rape shield statute, 18 Pa.C.S.A §3104, was applied in the case at bar to deny the accused his constitutional right to confront and cross-examine his accusers, this Court should decide whether, despite its laudatory purpose Pennsylvania's rape shield law, like the juvenile shield law in Davis v. Alaska, supra, must also yield in some circumstances to the constitutional rights of the accused on trial.

B. Due Process Right To Present Relevant Defense Testimony

Appellant was arrested within minutes of the alleged sexual attack, and undershorts he was wearing at the time were chemically analyzed. At trial the Commonwealth introduced evidence that the undershorts were found to contain seminal stains, and these shorts were the only Commonwealth exhibit presented and admitted as evidence. The Commonwealth, of course, had a right to present this evidence of semen stains on appellant's undershorts in an attempt to corroborate the complainant's accusation that defendant forced her to have sexual intercourse with him. However, once again the trial judge made a ruling that denied appellant the opportunity to attempt to rebut the inference sought to be established by the Commonwealth's evidence.

Appellant was not permitted to offer evidence of a source for the Commonwealth's physical evidence of semen stains on his undershorts, other than sexual intercourse with the complainant, in this case, where the defense was that no sexual intercourse or other sexual contact took place with the complainant. The trial judge improperly refused the defendant the opportunity to establish that on the same night of the claimed incident, before it allegedly occurred, the defendant had sexual intercourse with his wife Mable Berry, and that at that time he was wearing the same undershorts (C-1) which were found to have semen stains when he was later arrested in his bed shortly after the alleged incident.

Due process of law and the right to compulsory process are offended when the trial court permits the introduction of only the Commonwealth's version of the facts, while prohibiting the defense from offering evidence that may weaken or dispel the suggested inference:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Washington v. State of Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967).

The memorandum opinion of the Pennsylvania Superior Court panel did not reach the question presented but rather asserted that the exclusion did not harm appellant because it found that the acquittal by the jury on the rape charge

rejected a finding that sexual intercourse occurred, while defendant was convicted of indecent assault. This conclusion overlooks the fact that the introduction of the evidence of the seminal stains on the undershorts and the Commonwealth's sought-after inference that the seminal stains on defendant's undershorts were there as a result of an attack on the alleged victim by appellant, corroborated not only the rape charge but also the indecent assault charge because it tended to show, if believed by the jury, that appellant ejaculated while involved in an incident with the complainant.

The panel's memorandum decision also misapprehended the law, since, in a case where the defense testimony was that the alleged incident never happened at all and the Commonwealth contended that a rape as well as an indecent assault occurred, the jury's finding of guilty of indecent assault and not guilty of rape cannot be viewed as the acceptance or rejection of any particular evidence by the jury, but rather might well be a compromise verdict. See e.g. United States v. Dotterweich, 320 U.S. 270, 279, 64 S.Ct. 134, 135 (1943); Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932); Commonwealth v. Carter, 444 Pa. 405, 282 A.2d 375 (1971).

In a case where the Commonwealth's evidence against appellant was far from overwhelming, and consisted only of the testimony of the alleged victim, aside from the physical evidence which the defense was prohibited from rebutting through limited cross-examination and the presentation of defense evidence, the result of the trial court's erroneous

and unconstitutional rulings was a one-sided trial with a conviction that should not be permitted to stand.*

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

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* This case is properly on appeal because of the unconstitutional application of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104. The second erroneous and unconstitutional ruling prohibiting the defense from offering relevant evidence to attempt to explain the semen stains on appellant's undershorts presents an issue that by itself is not capable of being brought on appeal, but this Court has recognized that the denial of a federal constitutional right can be included in an appeal, when the appeal is properly before the Court. See Flourney v. Wiener, 321 U.S. 253, 64 S.Ct. 548 (1944).

IN THE COURT OF COMMON PLEAS OF [illegible] COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : AUGUST TERM, 1977

vs. :

[illegible] DORSEY : NO. 1207

O P I N I O N

Cleary, J., et al.

The defendant [illegible] was brought to trial before a jury, on charges of rape, involuntary deviate sexual intercourse, aggravated assault. The jury returned a verdict of not guilty on the rape charge but guilty of the lesser offenses. Timely filed post-verdict motions, which both argued and denied. Thereafter, the defendant [illegible] and now, [illegible], this [illegible] to judgment. Defendant [illegible] appeal.

[illegible]

EXHIBIT "A"

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[illegible] was filed on July 18, 1980, but not received until September [illegible], upon return from summer vacation. The Statement, containing nineteen [illegible] paragraphs, many are redundant and have been considered by the Court for the purpose of this decision.

Defendant first complains that the Court erred in denying his Motion to Suppress Physical Evidence. He argues that probable cause for the search warrant to seize Defendant's underwear was acquired as a result of Defendant's unlawful arrest. He contends that Defendant's arrest was unlawful in that [illegible] Defendant have probable cause to arrest [illegible] Defendant [illegible] Fla. Stat. [illegible] 901.15, 901.151 [illegible] Fla. [illegible] 10, 1977, [illegible] 347, [illegible] 53, [illegible] 2d [illegible] 2, 12, 17; [illegible] 2d [illegible] 2, [illegible] 2d [illegible] 2, [illegible] 2d [illegible] 2,

evidence established that Officer Anthony [illegible], while patrolling in a radio patrol car, at midnight on August 21, 1970, received a radio message to meet complainant with a complaint of possible rape, at 15th and York Streets. As the officer approached this intersection, he saw complainant emerging from a telephone booth crying and in an agitated state. She informed the officer that she had just been raped inside 2412 Dancroft Street by her stepfather. Officer Magdalinski radioed for assistance and with complainant proceeded to 2412 Dancroft Street, while [illegible] three streets [illegible] of 15th on York St[illegible]. [illegible] the officer that she resided at this residence with her two children, along with her mother and [illegible]. Upon arrival at the premises, the officer found the [illegible] and complainant explained what had taken place. Both the [illegible] and complainant [illegible] her legs. Both the officer and complainant [illegible] [illegible] [illegible]

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J. 677/81

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 1564 Philadelphia, 1980
WILLIAM BERRY, Appellant.	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. Haniel Henry
PROTHONOTARY

Dated: November 30, 1981

EXHIBIT "B"

J. 677/81

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 1564 Philadelphia, 1980
WILLIAM BERRY, Appellant.	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Philadelphia County, at Nos. 1306 and 1307 August Term, 1979.

Before: CERCONE, P.J., HESTER, AND JOHNSON, JJ.

PER CURIAM:

The judgment of sentence of the lower court is affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WILLIAM BERRY, Appellant.	:	No. 1564 Philadelphia, 1980

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Philadelphia County, at Nos. 1306 and 1307 August Term, 1979.

Before: CERCONE, P.J., HESTER, and JOHNSON, JJ.

MEMORANDUM OPINION:

Appellant, William Berry, takes this appeal from his conviction for indecent assault.[1] Appellant argues for two reasons that the trial court's rulings denied him due process, the right to confront witnesses against him, and the right to present a defense. We find appellant's arguments to lack merit and we affirm.

The victim of this alleged attack was Deborah Young, appellant's twenty-five year old step-daughter. Miss Young testified that on August 10, 1979, she and her two children were living in the same house with her mother and step-father; also living in the house were the complainant's sister and the sister's children. According to Miss Young, on the date in question she returned home at approximately 11:30 p.m. and went directly to bed. Miss Young's five-year-old daughter shared her bed, and her seven-year-old son slept in a separate bed in the

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[1]Appellant was acquitted of the charge of rape.

same room. At about 12:15 a.m. that same evening (now August 11, 1979), the complainant awoke to find her step-father in the process of performing an act of intercourse with her. Miss Young pushed him away and asked him what he was doing in her room, whereupon appellant told her to be quiet, put on his undershorts, and left her room. Her children remained sleeping during the incident and, immediately after appellant left her room, the complainant prompty put on some clothes and went outside to a pay phone to call the police, since there was no phone in the house.

The police responded within a few minutes and upon entering the house, they found appellant, apparently asleep, in bed with his wife, the victim's mother. At the time of his arrest, appellant was wearing a tee-shirt and boxer-type undershorts. Miss Young told the police that those were the same undershorts worn by appellant during the incident. Tests later performed on the undershorts indicated the presence of seminal stains and spermatozoa. The complainant was taken to the hospital shortly after the incident and an examination showed the presence of prostatic seminal fluid, though no spermatozoa, in her genital region.[2] Appellant denied that the incident took place and

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[2]The expert witness called by the prosecution testified that the absence of spermatozoa could be explained in two ways. The expert stated that spermatozoa can be released at any time during ejaculation. The witness also indicated that the absence of sperm could mean that the man was sterile.

claims that the stain on his undershorts was a result of having had sexual intercourse with his wife the night before.

At trial, William E. Jackson, a microbiologist, testified for the Commonwealth. It was Mr. Jackson who analyzed the specimens taken from the genital region of the victim and who also performed the tests on the undershorts taken from appellant. Mr. Jackson testified that prostatic seminal fluid is produced only by males. Mr. Jackson further testified that this seminal fluid doesn't "last in a female for more than 48 hours." In view of this last statement by Mr. Jackson, defense counsel later endeavored to ask the complainant if she had had sexual intercourse with another man in the twenty-four hour period preceding the alleged rape. This line of questioning was objected to by the Commonwealth and the objection was sustained by the court, citing 18 Pa.C.S. §3104(a) (Supp. 1981). This section of the law reads:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. §3104(a).

Appellant challenges the trial court's ruling in this matter, arguing that since consent was not an issue in the

instant case and in view of Mr. Jackson's testimony in which he said that seminal fluid "lasts" up to forty-eight hours in the vagina, appellant should be permitted to ask the complainant if she had had intercourse with another in the twenty-four hours preceeding the said incident. We disagree. The intent behind section 3104 was to protect a witness from attacks designed merely to harass and humiliate. Commonwealth v. Strube, ___ Pa. Superior Ct. ___, ___, 418 A.2d 365, 369 (1979). Prior to the passage of section 3104, a complainant in a rape case could be questioned at length regarding her prior sexual contacts and witnesses could be called by the defense to impugn the victim's chastity, all under the theory that "a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure." Lee v. State, 132 Tenn. 655, 658, 179 S.W. 145, 145 (1915). The fear was that a woman who in reality had consented to premarital, sexual relations might later regret her decision and "cry rape" at a subsequent date. As this Court previously noted, "[t]he rape shield laws are legislative recognitions of the minimal probative value of sexual history and are designed to prohibit, to varying degrees, the travesty of presenting a noisome stream of defense witnesses testifying to the sexual propensities, often sordid and sometimes fanciful, of the complaining witness." Commonwealth v. Strube, ___ Pa. Superior Ct. at ____, 418 A.2d at 369.

In Commonwealth v. Duncan, ___ Pa. Superior Ct. ___, 421 A.2d 257 (1980), this Court was asked to delineate the scope of the exclusionary prohibition set forth in section 3104. The defendant in Duncan wished to use evidence of the victim's past sexual conduct to show bias on the part of that witness. This evidence was not allowed and the defendant appealed. We affirmed, saying:

> [I]n enacting 18 Pa.C.S.A. §3104 the legislature has determined that evidence of past sexual conduct by the victim with third persons is not admissible for any purpose. The statute does not state that the evidence is admissible except for the purpose of showing the victim's reputation. Rather it generally prohibits the admission of such evidence for any purpose except in the sole instance where consent is at issue and the evidence relates to conduct of the victim with the defendant. Where, as here, the words of the s atute are clear, the letter thereof will not be disregarded under the pretext of pursuing an unstated legislative intent."

Id. at ____, 421 A.2d 258. (citations omitted) (emphasis in original). In view of our holding in Duncan, we find appellant's argument to lack merit.

Appellant also contends that the trial court committed reversible error when the court refused to allow appellant to call his wife to the stand to testify that she and appellant had had sexual intercourse the previous night and that on that night appellant was wearing the same undershorts that he had on when he was arrested. We do not find this to be a reason to reverse because we do not find that appellant was harmed by this ruling. The jury acquitted appellant of the charge of rape, although it

convicted him of indecent assault. This means that while the jury believed that appellant may have lain on top of his victim, it did not find that appellant actually penetrated the victim's vagina with his penis. Therefore, in view of the verdict returned by the jury, it is apparent that the presence of seminal stains on appellant's undershorts was of no moment, since sexual intercourse is a necessary element for the charge of rape. Accordingly, appellant did not need to prove that the seminal stains on appellant's shorts were a result of sexual intercourse with his wife, rather than from raping his step-daughter, since the jury did not find that appellant raped his step-daughter. For this reason, we find that the argument advanced by appellant is not cause to reverse.

Affirmed.

Supreme Court of Pennsylvania

Marlene Lachman Esq.
PROTHONOTARY

Eastern District

468 CITY HALL
PHILADELPHIA 19107
(215) 496-4600

September 2, 1982

John W. Packel, Esq.
Chief, Appeals
DEFENDER ASSOCIATION
121 N. Broad Street
Philadelphia, Pa. 19107

RE: Commonwealth of Pennsylvania
v. William Berry, Petitioner
No. 680 E. D. Misc. Dkt. 1981

Dear Mr. Packel:

This is to advise you that on August 30, 1982 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

Marlene Lachman, Esq.
Prothonotary

ML:jap
cc: Robert Lawler, Esq.

EXHIBIT "C"

RECEIVED
[illegible] 25 1982
SUPREME COURT
EASTERN DISTRICT

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Benjamin Lerner, Defender, and
LEONARD SOSNOV, Assistant Defender
Identification No. 00001
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Philadelphia, Pa. 19107
(215) 568-3190

Attorney for WILLIAM BERRY

WILLIAM BERRY, Appellant	IN THE SUPREME COURT OF PENNSYLVANIA - EASTERN DISTRICT
VS.	NO. 680 E.D.
COMMONWEALTH OF PENNSYLVANIA	MISC. DKT. 1981

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Berry, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, entered on August 30, 1982 in Commonwealth of Pennsylvania v. Berry, denying appellant's petition for allowance of appeal from the Superior Court of Pennsylvania's affirmance of appellant's judgment of conviction and sentence.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "D"

COPY
Original Filed in Superior Court
OCT 2[illegible] 1982
Phila District

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Attorney for WILLIAM BERRY

WILLIAM BERRY, Appellant	IN THE PENNSYLVANIA SUPERIOR COURT
VS.	NO. 1564
COMMONWEALTH OF PENNSYLVANIA	PHILADELPHIA, 1980

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that William Berry, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, entered on August 30, 1982 in Commonwealth of Pennsylvania v. Berry, denying appellant's petition for allowance of appeal from the Superior Court of Pennsylvania's affirmance of appellant's judgment of conviction and sentence.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "E"

RECEIVED

CLERK OF
QUARTER SESSIONS

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Attorney for WILLIAM BERRY

WILLIAM BERRY, Appellant	IN THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
VS.	AUGUST SESSION, 1979
COMMONWEALTH OF PENNSYLVANIA	NO. 1307

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Berry, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, entered on August 30, 1982 in Commonwealth of Pennsylvania v. Berry, denying appellant's petition for allowance of appeal from the Superior Court of Pennsylvania's affirmance of appellant's judgment of conviction and sentence.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "F"

NO. 82-5637

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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DEC 28 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM BERRY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania (Pennsylvania Supreme Court No. 680 E.D. Misc. Docket 1981; Pennsylvania Superior Court No. 1564, Philadelphia 1980; Philadelphia Common Pleas Court Information 1307, August Term, 1979).

MOTION OF APPELLEE TO DISMISS

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December 28, 1982

TABLE OF CONTENTS

	PAGE
Motion to Dismiss	1
Question Presented	1
Statement of the Case	1-2
Argument	
The appeal should be dismissed because it is based on non-existent, waived, and non-cognizable claims.	3-7
A. There is no federal question here: the victim testified as to her sexual activity on the evening of the assault.	3
B. At trial, defendant strategically waived his challenge to the constitutionality of the Rape Shield Law.	4-5
C. On appeal, defendant again waived his constitutional challenge to the Rape Shield Law.	5
D. As defendant concedes, his remaining claim is non-cognizable; in addition, it warrants dismissal because it is thrice waived and without substance.	5-7
Conclusion	8

TABLE OF CITATIONS

	PAGE
Federal Cases	
Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902)	7
Palmer Oil Corp. v. Almeida Petroleum Corp., 343 U.S. 39 (1952)	7
Steinbridge v. Georgia, 343 U.S. 541 (1952)	5
Zucht v. King, 260 U.S. 174 (1922)	7
Pennsylvania Cases	
Commonwealth v. Ashford, 268 Pa. Superior Ct. 225 (1979)	5
Commonwealth v. Berry, No. 1564, Philadelphia 1980 (Pa. Superior filed 11/30/81)	2
Commonwealth v. Berry, No. 680 E.D. Misc. Docket 1981 (Pa. filed 8/30/82)	2
Commonwealth v. Clair, 458 Pa. 418 (1974)	4
Commonwealth v. Duncan, 279 Pa. Superior Ct. 395 (1980)	5
Commonwealth v. Green, 477 Pa. 170 (1978)	6
Commonwealth v. Linder, 284 Pa. Superior Ct. 327 (1981)	5
Commonwealth v. Lowery, ___ Pa. Superior Ct. ___, 410 A.2d 867 (1979)	6
Commonwealth v. Richardson, 476 Pa. 571 (1978)	3
Commonwealth v. Sisco, 484 Pa. 85 (1979)	4
Commonwealth v. Slaughter, 482 Pa. 538 (1978)	4
Commonwealth v. Smith, 487 Pa. 626 (1980)	4
Commonwealth v. Stolzfus, 462 Pa. 43 (1974)	6
Other Authority	
18 Pa.C.S.A. §3104	passim
Pa.R.A.P. 521	5
Rules of the Supreme Court of the United States, Rule 16	1

PAGE

Strazzella, The Binding Nature of Pennsylvania Appellate Opinions: Some Problems After Appellate Reorganization, 4 Pennsylvania Law Journal Reporter, No. 26, p.1 (1981) 2

28 U.S.C. §1267 2

MOTION TO DISMISS

Appellee, Commonwealth of Pennsylvania, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the appeal be dismissed because the federal question here raised was not properly raised below, because the state courts' judgment below rests on an adequate non-federal basis, and because there is no substantial federal question presented here.

QUESTION PRESENTED

Has defendant waived his challenge to the constitutionality of the Pennsylvania Rape Shield Law, as applied below?

STATEMENT OF THE CASE

Defendant, William Berry, appeals from the judgments of sentence for indecent assault, imposed by the Pennsylvania courts. Because he did not present to the state courts the federal questions he now raises, there are no federal questions before this Court, which should dismiss.

The trial evidence showed that on the evening of August 10, 1979, Ms. Deborah Young awakened when defendant, her stepfather, put his penis in her vagina. She immediately reported the incident to the police, who charged defendant with rape and indecent assault. A chemist testified at defendant's trial that although Ms. Young had no sperm in her vagina, there were traces of recent male ejaculate. Defendant sought to cross-examine Ms. Young on her sexual activity that night, presumably to establish that another had deposited the ejaculate. The trial judge, the Honorable Curtis C. Carson, Jr., citing the Pennsylvania Rape Shield Law, 18 Pa.C.S.A. §3104, precluded such questioning, but allowed

defendant to produce extrinsic evidence of the victim's prior sexual activity. Defendant chose not to do so. Nor did defendant cross-examine the victim on her prior sexual history after the prosecutor later opened the door to such questioning. The jury acquitted defendant of rape and convicted him of misdemeanor indecent assault.

Despite defendant's lengthy criminal record, his misdemeanor conviction allowed imposition of only a minimal jail sentence which defendant has already served. Defendant appealed to the Pennsylvania Superior Court, which affirmed in an rereported, non-precedential opinion.[1] Commonwealth v. Berry, No. 1564, Philadelphia 1980 (Pa. Superior filed 11/30/81). The Pennsylvania Supreme Court denied discretionary review. Commonwealth v. Berry, No. 680 E.D. Misc. Docket 1981 (Pa. filed 8/30/82). Defendant now appeals to this Court pursuant to 28 U.S.C. §1267(2), alleging that the Rape Shield Law, as applied below, violates the sixth amendment. Since claim was not properly raised in the state courts, however, this Court must dismiss.

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[1] See Strazzella, The Binding Nature of Pennsylvania Appellate Opinions: Some Problems After the Appellate Reorganization, 4 Pennsylvania Legal Journal Reporter, No. 26, p.1, 10 (July 6, 1981).

ARGUMENT

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS BASED ON NON-EXISTENT, WAIVED, AND NON-COGNIZABLE CLAIMS.

Defendant's appeal is not properly before this Court: (1) because the victim was questioned on her prior sexual history, there is no confrontation question here, or, indeed, any federal question whatsoever; (2) defendant strategically waived his challenge to the Rape Shield Law; (3) defendant concedes that his remaining allegation is not cognizable (Jurisdictional Statement at 20 n.*).

A. There is no federal question here: the victim testified as to her sexual activity on the evening of the assault.

At trial, defendant viciously cross-examined Ms. Young, casting grave aspersions on her sobriety and chastity on the evening of the assault (N.T. 83-113). Thus, on redirect examination, the prosecutor questioned Ms. Young as follows:

> BY [THE PROSECUTOR]:
>
> Q. Debbie, the lawyer went in to a lot of questions about where you went and who you were with so I'm going to have to ask you this question. Did you have sexual intercourse with anybody else that evening?
>
> A. (By Ms. Young): No.

(N.T. 114).

Thus, contrary to defendant's allegations, Ms. Young was questioned on her prior sexual history. Accordingly, there is no federal question in this case. Commonwealth v. Richardson, 476 Pa. 571, 584 n.3, 383 A.2d 510 n.3, cert. denied, 436 U.S. 910 (1978) (there is no prejudice caused by restricting defense cross-examination of a prosecution witness if the information sought is elicited from other witnesses).

B. At trial, defendant strategically waived his challenge to the constitutionality of the Rape Shield Law.

Once the prosecutor asked the victim about her prior sexual activity, he undoubtedly opened the door to similar defense questioning.[2] Defendant neither asked such questions nor presented any extrinsic evidence of Ms. Young's alleged sexual activity that night -- as Judge Carson permitted him to do -- despite his assertion that he had a witness who could testify to her social encounters (N.T. 11). There was an obvious strategy for this inaction: rather than risk the victim's repeated denials of other sexual activity, defendant instead speculated and further smeared Ms. Young, in his jury closing:

> Another thing, is it all that unusual for Miss Young to have residue of sexual activity? Miss Young has two children, I assume that at some point in her life she did have consensual sexual activity and I don't think it is beyond the realm of possibility or common sense to believe that in addition to those two occasions, she has consensual sexual activity at other times.

(N.T. 213).

Under Pennsylvania law, defendant's use of this strategy undoubtedly waived his present constitutional challenge to "restricted" cross-examination under the Rape Shield Law. Commonwealth v. Smith, 487 Pa. 626, 632, 410 A.2d 787, 790 (1980); Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).

Although the Superior Court, in its unpublished, non-precedential opinion, appeared to pass on the merits of defendant's constitutional claim, it is apparent that the Pennsylvania Supreme Court declined to review the claim because defendant had not properly raised the claim at trial and so waived it. Thus, this Court

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[2] See Commonwealth v. Sisco, 484 Pa. 85, 88-89, 398 A.2d 955, 957 (1979) (prosecutor properly explored inadmissible testimony that defense counsel had already elicited); Commonwealth v. Slaughter, 482 Pa. 538, 543-44, 394 A.2d 453, 455 (1978) (same).

is without jurisdiction to hear this case because "the question of the existence of an adequate state ground is debatable." Steinbridge v. Georgia, 343 U.S. 541, 547-48, 72 S. Ct. 834, 838, 96 L.Ed. 1130 (1952).

C. On appeal, defendant again waived his constitutional challenge to the Rape Shield Law.

Under state law, defendant was obligated to notify the Pennsylvania Attorney General of his constitutional challenge or waive the claim.[3] Defendant failed to give this notice, and so again waived his challenge to the Rape Shield Law. Thus, this Court is again without jurisdiction to review the Pennsylvania courts' decisions below, which are almost certainly supportable on independent state grounds.

D. As defendant concedes, his remaining claim is non-cognizable; in addition, it warrants dismissal because it is thrice waived and without substance.

Defendant's trial strategy is apparent: he sought to prosecute the victim, impugning her character at every opportunity (N.T. 83-113, 161, 162-64, 165, 169-70, 181). Thus, Judge Carson was repeatedly forced to curtail the introduction of inflammatory, irrelevant evidence and focus the jury's attention on the question before them: whether defendant attacked the victim. For instance, the Commonwealth presented equivocal testimony that the ejaculate found in Ms. Young's vagina and the sperm stains found on the undershorts defendant wore on August 10, 1979, might have been left by the same man. Defendant hotly disputed this, arguing

[3] Pa.R.A.P. 521; Commonwealth v. Duncan, 279 Pa. Superior Ct. 395, 398-99 n.3, 421 A.2d 257, 259 n.3 (1980); Commonwealth v. Ashford, 268 Pa. Superior Ct. 225, 228 n.3, 407 A.2d 1328, 1330 n.3 (1979). But see Commonwealth v. Linder, 284 Pa. Superior Ct. 327, 425 A.2d 1126 (1981).

repeatedly that the sperm stains were the result of defendant's sexual activity with his wife that evening (see e.g. N.T. 212-13). Judge Carson permitted defendant to advance this highly speculative theory which was successful; defendant was acquitted of the rape charge. In attempting to focus the jury's attention on the issue before them, however, the judge did not allow defendant's wife describe their sexual activities that evening. Defendant now contends that this ruling unconstitutionally precluded him from putting on a defense. This Court must dismiss because (1) the claim is not cognizable, as defendant concedes; (2) the claim was thrice waived; and (3) there is no substantial federal question here.

1. Cognizability

Defendant concedes that his remaining issue "is not capable of being brought on appeal," but contends that he can somehow join it to the Rape Shield claim (Jurisdictional Statement at 20 n.*). Since that claim is not properly before this Court (see Arguments A-C, supra), the remaining issue, too, may not now be reviewed.

2. Waiver

The theory of defendant's objection was changed from trial to appeal. At trial, in his "Statement of Matters Complained of on Appeal," and in his post-verdict motions, defendant alleged only that Judge Carson's ruling was erroneous (N.T. 187-90). He raised his present sixth amendment claim for the first time before the Superior Court. In changing the theory of his objection, defendant waived both theories.[4]

Once again it is certainly debatable as to whether the Pennsylvania courts' rulings are supported by an independent, adequate

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[4] Commonwealth v. Green, 477 Pa. 170, 180, 383 A.2d 877, 881-82 (1978); Commonwealth v. Stolzfus, 462 Pa. 43, 59-60, 337 A.2d 873, 881, appeal dismissed, cert. denied 419 U.S. 1065 (1974); Commonwealth v. Lowery, ___ Pa. Superior Ct. ___, 410 A.2d 867, 868 (1979), discretionary review granted on unrelated issue, Commonwealth v. Lowery, E.D. Allocatur Docket No. 4608 (Pa. 3/17/80).

state ground. Accordingly, this Court is without jurisdiction here and should dismiss this appeal.

3. Lack of Federal Question

Judge Carson undoubtedly was obligated to conduct defendant's trial fairly and efficiently. In precluding defendant from telling the jury of his wife's sexual history, the judge simply did not prejudice defendant, as the judge himself stated:

> These are things that you are going to subsequently argue, in fact it opens the door and doesn't even limit you in any way.
>
> [Defense Counsel]: Fine.

(N.T. 190).

Accordingly, defense counsel argued at length that the stains were the result of his having sex with his wife that evening:

> [Defense Counsel]: And I want to talk just a bit more about sperm on Mr. Berry's shorts. Now, you heard, they testified they found sperm on Mr. Berry's shorts. Nobody testified how recent it was but consider this, ladies and gentlemen, in fact consider two things. Mr. Berry, you have heard through testimony is married, you heard that he was sleeping with his wife on the night that this happened? Is it all that unusual for a married person who sleeps with his wife to have sperm, seminal fluid on his boxer shorts? No, it isn't.

(N.T. 212-13).

Defendant's argument was effective: the jury acquitted him of the rape charge, convicting only on the misdemeanor indecent assault.

Thus, assuming Judge Carson's actions occasioned any error, it undoubtedly is so insignificant as to warrant dismissal for want of a substantial federal question.[5]

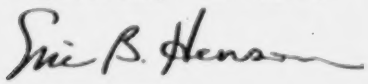
---

[5] See Palmer Oil Corp. v. Almeida Petroluem Corp., 343 U.S. 39, 72 S. Ct. 843 (1952); Zucht v. King, 260 U.S. 174, 43 S. Ct. 24 (1922); Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 124 (1902).

CONCLUSION

For the reasons stated herein, this appeal must be dismissed.

Respectfully submitted,



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DEC 28 1982
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BERRY, Appellant	:	OCTOBER TERM, 1983
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 82-5637

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Dismiss by hand delivery upon counsel for appellant, John W. Packel, Esquire, Defender Association of Philadelphia, 121 North Broad Street, Philadelphia, Pennsylvania 19107, on December 28, 1982.

Eric B. Henson

ERIC B. HENSON
Deputy District Attorney
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 28th day :
of December, 1982, A.D. :

Nerdia R. Green
NOTARY PUBLIC

My Commission Expires: April 21, 1986

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BERRY, Appellant	:	OCTOBER TERM, 1983
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 82-5637

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Dismiss by hand delivery upon counsel for appellant, John W. Packel, Esquire, Defender Association of Philadelphia, 121 North Broad Street, Philadelphia, Pennsylvania 19107, on December 28, 1982.

Eric B. Henson

ERIC B. HENSON
Deputy District Attorney
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 28th day :
of December, 1982, A.D. :

NOTARY PUBLIC

My Commission Expires: April 21, 1986

JAN 21 PAGE 1

82-5637

NUMBER

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM BERRY, APPELLANT

V.

COMMONWEALTH OF PENNSYLVANIA, APPELLEE

On Appeal From The Supreme Court Of Pennsylvania (Pennsylvania Supreme Court No. 680 E.D. Misc. Docket, 1981; Pennsylvania Superior Court No. 1564, Philadelphia, 1980; Philadelphia Common Pleas Court Information 1307, August Term, 1979).

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

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I. QUESTION PRESENTED

1. Does Not This Court Have Jurisdiction Since The State Court Decisions In This Case Did Not Rest On Adequate And Independent State Grounds?

II. TABLE OF CONTENTS

		PAGE
I.	QUESTION PRESENTED	1
II.	TABLE OF CONTENTS	2
III.	TABLE OF CITATIONS	3
IV.	ARGUMENT	4-6
	1. THE STATE COURT DECISIONS OF PENNSYLVANIA DID NOT REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS, THEREFORE THIS COURT HAS JURISDICTION.	
	CONCLUSION	7

III. TABLE OF CITATIONS

CASES	PAGE
COMMONWEALTH V. BOTTCHENBAUGH Pa. Super., ___ A.2d ___ (11/19/82)	6
INTERNATIONAL STEEL & IRON COMPANY V. NATIONAL SURETY COMPANY 297 U.S. 657, 56 S.Ct. 619 (1936)	5
KRAEMER V. GUARANTEE TRUST & SAFE DEPOSIT COMPANY 173 Pa. 416, 33 A. 1047 (1896)	5
MARYLAND V. BALTIMORE RADIO SHOW 338 U.S. 912, 70 S.Ct. 252 (1950)	5
MYHALYK V. LEWIS 398 Pa. 395, 158 A.2d 305 (1960)	5
POAFPYBITTY V. SHELL OIL COMPANY 390 U.S. 365, 88 S.Ct. 982 (1968)	4
STATE V. BRAND 303 U.S. 95, 58 S.Ct. 443 (1938)	5
STEELE V. LOUISVILLE & N.R. COMPANY 323 U.S. 192, 65 S.Ct. 226 (1946)	4
UNITED STATES V. CARVER 260 U.S. 482, 43 S.Ct. 181 (1923)	5

RULES OF PROCEDURE	
Rule 521, Pa.R.App.P.	5,6
Rule 1114, Pa.R.App.P.	5
Rule 1121, Pa.R.App.P.	5

IV. ARGUMENT

1. THE STATE COURT DECISIONS OF PENNSYLVANIA DID NOT REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS, THEREFORE THIS COURT HAS JURISDICTION.

In its motion to dismiss this appeal, appellee, the Commonwealth of Pennsylvania, asserts various procedural state grounds which it contends could have supported the judgments of the Pennsylvania courts, and therefore reasons that this Court is deprived of jurisdiction to hear this appeal. What the Commonwealth ignores is that the trial judge considered the federal constitutional attack on the validity of the rape shield statute on the merits, and saw no state procedural bar to his consideration, as is clear from his opinion, and the appellate court also saw no state procedural bar to consideration, as it "appeared to pass on the merits of defendant's constitutional claim."* Motion of Appellee to Dismiss, p. 4. Under such circumstances, even if it was assumed arguendo that the appellate court might have based its decision on an adequate and independent state grounds, this is irrelevant because the fact is it did not, and this Court therefore has jurisdiction. See e.g., Poafpybitty v. Shell Oil Company, 390 U.S. 365, 375-76, 88 S.Ct. 982, 987 (1968); Steele v. Louisville & N.R. Company, 323 U.S. 192, 197, n. 1, 65 S.Ct. 226, 229, n. 1 (1944);

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* The Commonwealth of Pennsylvania's contention that there is no federal constitutional question because the complainant did answer a question posed by the prosecutor as to whether she had sexual intercourse on the night of the alleged rape is meritless, because the relevant and appropriate scope of the inquiry which appellant was prohibited from conducting on cross-examination because of the operation of the rape shield statute was whether she had intercourse during the last twenty-four or forty-eight hours, the period when the seminal fluid found in her vagina could have been present according to the Commonwealth's own evidence.

State v. Brand, 303 U.S. 95, 98, 58 S.Ct. 443, 445 (1938); International Steel & Iron Company v. National Surety Company, 297 U.S. 657, 666, 56 S.Ct. 619, 623 (1936).

The Commonwealth of Pennsylvania's assertion that the Pennsylvania Supreme Court declined to review appellant's case after the Superior Court refused relief because the Supreme Court of Pennsylvania concluded that the constitutional claim had been waived is without legal or evidentiary support. Pennsylvania, as with this Court's certiorari jurisdiction, provides for discretionary review of final judgments of its intermediate appellate courts. "Review ... is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefore." Rule 1114, Pa.R.App.P. Two members of the seven member Pennsylvania Supreme Court must vote to entertain the appeal before the appeal will be allowed. Rule 1121, Pa.R.App.P.

As does this Court, Pennsylvania law recognizes that the denial of discretionary review is without legal significance. E.g., Myhalyk v. Lewis, 398 Pa. 395, 402, 158 A.2d 305, ___ (1960); Kraemer v. Guarantee Trust & Safe Deposit Company, 173 Pa. 416, 419, 33 A. 1047 (1896). The denial of discretionary review simply means that there were not sufficient votes forthcoming to hear the appeal. See Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-920, 70 S.Ct. 252, 254-55 (1950) (opinion of Frankfurter, J., respecting denial of certiorari); United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 182 (1923).

Finally, it should be noted that the Commonwealth's claim that appellant waived his constitutional challenge on appeal in the Pennsylvania appellate courts because he failed to fulfill an alleged obligation, pursuant to Rule 521, Pa.R.App.P., to notify the Pennsylvania Attorney General

of his constitutional challenge, is completely spurious. This is clear from the plain language of Rule 521, Pa.R. App.P., which provides as follows:

> Rule 521. Notice to Attorney General Of Challenge To Constitutionality Of Statute
>
> (a) Notice. It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record raising the issue, and to file proof of service of such notice.
>
> (b) Status of Attorney General. The Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter.

The Commonwealth of Pennsylvania, being a party to this action, notice to the Attorney General of Pennsylvania was not required in the Pennsylvania appellate courts to preserve the constitutional issues, as has been recognized by the most recent decision of Pennsylvania's appellate courts, not cited in the Commonwealth of Pennsylvania's motion to dismiss. Commonwealth v. Bottchenbaugh, Pa. Super., ___ A.2d ___ (slip opinion, p. 10, n. 1) (November 19, 1982).*

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* This opinion, not yet reported, is attached as Exhibit "A" to this brief.

CONCLUSION

For the reasons set forth here and in appellant's jurisdictional statement, appellee's motion to dismiss should be denied, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Benjamin Lerner

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
BENJAMIN LERNER, Defender

J. 1837/80

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HAROLD J. BOTTCHENBAUGH, Appellant	:	No. 569 Philadelphia, 1980
COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMES COLLINS, Appellant	:	No. 570 Philadelphia, 1980

Appeal from Judgments of Sentence of the Court of Common Pleas, Criminal Division, of Bucks County at No. 2477 and 2478 of 1978.

BEFORE: HESTER CAVANAUGH and VAN DER VOORT, JJ

OPINION BY CAVANAUGH, J.: FILED NOV 19 1982

This case involves an appeal from a summary conviction for violation of section 7105 of the Crimes Code, 18 Pa.C.S.A. §7105, Violation of Pool and Billiard Regulations. Appellants were found guilty by a district justice. They appealed to the Court of Common Pleas of Bucks County for a de novo hearing. Following this hearing, the Honorable Oscar S. Bortner also found appellants guilty of violating the Pool and Billiard regulations and this appeal followed.

A review of the record discloses that appellants failed to file any post-verdict motions. Our recent decision in Commonwealth v. Koch, 288 Pa. Super. 290, 431 A.2d 1052 (1981) as well as the comment to Pa.R.Crim.P. 1123 (effective July 1, 1981) make it clear that post-verdict motions must now be filed in

cases involving summary convictions. However, because appellants filed their appeal prior to the filing of Koch and the effective date of the comment to Rule 1123, we hold that appellants have not waived their right to file post-verdict motions. While the usual remedy applied by this court has been to remand for the filing of post-verdict motions, judicial economy permits us to reach the merits of appellants' argument.

The sole question raised by this appeal concerns whether Pennsylvania Crimes Code Section 7105 is constitutional.[1] We find that this regulation of pool and billiard rooms is constitutional and therefore affirm the decision of the lower court.

Section 7105 provides:

> A person is guilty of a summary offense if he, being a licensed keeper, proprietor, owner or superintendent of any public poolroom or billiard room except as otherwise provided in this section for cities of the first class, permits such place to remain open on Sunday or between the hours of one o'clock antemeridian and six o'clock antemeridian of any secular day, or knowingly allows or permits any person under the age of 18 years to be present in any public poolroom or billiard room, or if he, being a licensed keeper, proprietor, owner or superintendent of any public poolroom or billiard room having at least six tables, in a city of the first class, permits such place to remain open on Sunday, except between the hours of one o'clock postmeridian and ten o'clock postmeridian, or knowingly allows or permits any person under the age of 16 years to be present in any such public poolroom or billiard room.

Act of December 6, 1972, P.L. ____, No. 334, §1, effective June 6, 1973, 18 Pa.C.S.A. §7105.

First, several of appellants' arguments may be disposed of summarily. Appellants were charged with violating section 7105 of the Crimes Code because they operated a pool room after 1 a.m. in a city not of the first class. They were not charged with either "operating on Sunday"[2] or "allowing any person under

the age of eighteen to be present in the poolroom." While a defendant in any enforcement proceeding generally has standing to assert any claim that challenges the authority to impose its force upon him, he does not have standing to object to the constitutionality of a statute unless he is affected by that particular feature alleged to be in conflict with the constitution. Commonwealth v. Haldeman, 288 Pa. 81, 135 A. 651 (1927); Commonwealth v. Dollar Savings Bank, 259 Pa. 138, 102 A. 569 (1917); Mesta Machine Co. v. Dunbar Furnace Co., 250 Pa. 445, 95 A. 585 (1915); Smith v. Yellow Cab Co., 87 Pa. Super. 143 (1926), aff'd 288 Pa. 85, 135 A. 858. Cf. Commonwealth v. Van Emburg, 467 Pa. 445, 359 A.2d 178 (1976); Commonwealth v. MacDonald, 464 Pa. 435, 347 A.2d 290 (1975) cert denied 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed. 2d 75 (1976). Accordingly, we shall not consider appellants' arguments regarding the constitutionality of those portions of section 7105 making it criminal to either "operate the poolroom on Sunday" or "allow any person under the age of eighteen to be present in the poolroom" but shall confine ourselves to that portion of section 7105 which regulates the operating hours of pool and billiard rooms in cities not of the first class which are required to be licensed by the individual municipality.

Appellants also argue that courts have held section 7105 is not applicable in townships which did not require pool and

billiard rooms to be licensed. Commonwealth v. Hamme, 35 D. & C.2d 539 (1965); Commonwealth v. Saloom, 40 D. & C.2d 388 (1966). The plain language of section 7105 limits the applicablity of the section to only those pool or billiard rooms required to be licensed. But we need not consider this argument since appellants are licensed to operate a poolroom in a township which requires poolrooms to be licensed.

Therefore, the constitutional question involved is whether or not the regulation of pool and billiard rooms operating under section 7105 only in cities other than those of the first class which require pool and billiard rooms to licensed, violates the Equal Protection clauses of either the United States or Pennsylvania Constitutions or the Due Process Clause of the United States Constitution.

The standard by which we review an asserted violation of the equal protection clause is well established.

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions... , our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest (Emphasis added)

New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511, 517 (1976) on remand Dukes v. New Orleans (1976 CA5 La) 537 F.2d 856 (1976); McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) on remand McLaughlin v. State (1965, Fla.) 1972 So.2d 466 (1965).

The Equal Protection clause dictates that:

> A classification "must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Laudenberger v. Port Authority of Allegheny County, 496 Pa.52, 436 A.2d 147, 155 (1981).

Since the appellants do not contend that their activities in operating a poolroom or billiard room involves either a fundamental right or a suspect classification, their claim of discrimination must be judged by the rational basis test. This inquiry employs a relatively relaxed standard reflecting the judiciary's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unaviodable one. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed 2d 520, 525 (1975).

Generally speaking, a legislative classification will not be violative of equal protection if facts may be reasonably

conceived to justify the distinction. Adler v. Montefiore Hospital Association of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634 (1973), cert. denied 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed. 2d 755 (1974). Nevertheless, the presumption of validity is not absolute. Commonwealth v. Beam, 227 Pa. Super. 293, 324 A.2d 549 (1974).

The United States Supreme Court recently stated that:

> 'The Fourteenth Amendment does not prohibit legislation merely because it is special or limited in its application to a particular geographical or political subdivision of the state' ... Rather the Equal Protection Clause is offended only if the State's classifications 'rests on grounds wholly irrelevant to the achievement of the State's objective' ...

Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978).

Appellants cite Kroger Co. v. O'Hara Township, et al., 481 Pa. 101, 392 A.2d 266 (1978) to contend that the classifications of section 7105, like the Blue Law classifications of Kroger, are unreasonable, arbitrary and lack a fair and substantial relation to a legislative objective because it fails to treat all persons similarly situated alike. We disagree. The facts of Kroger are recognizably distinguishable from the present case. Kroger involved Sunday Blue Laws and the patchwork regulation of businesses to create a uniform day of rest. The present case involves a legislative grant of power to

cities other than those of the first class to regulate the daily operating hours[3] of pool and billiard rooms through the municipalities licensing powers. 53 Pa.C.S.A. §23107.

Under the "Home Rule Charter and Optional Plans Law", 53 Pa.C.S.A. §1-101 et seq., the legislative and corporate powers of municipalities and the duties of the officers thereof are determined by classifications based upon population. 53 Pa.C.S.A. §101. However, Philadelphia is the only municipality in the Commonwealth to qualify as a city of the first class under this scheme. The legislature of this Commonwealth in enacting 53 Pa.C.S.A. §1-101 et seq. granted cities of the first class broad legislative powers, 53 Pa.C.S.A. §16254, while limiting lesser municipalities to only those police powers specifically delegated by the legislature. 53 Pa.C.S.A. §23103 (Cities of the Second Class); 53 Pa.C.S.A. §36006 (Cities of the Third Class). The power to regulate such amusements had not been specifically granted to municipalities prior to section 7105.

Section 7105 of the Crimes Code permits lesser municipalities to minimally regulate the operating hours of pool and billiard rooms through the licensing power the legislature had previously delegated to them, but also guarantees the operators of pool and billiard rooms the right to operate between 10 a.m. and 1 a.m. daily. 18 Pa.C.S.A. §7105; 53 Pa.C.S.A. §23107, 53 Pa.C.S.A. §37601 et seq.

This legislative delegation of police power is analogous to the legislature's delegation of its police power with regard to the grant of liquor licenses under the Liquor Code. 47 Pa.C.S.A. §4-472. The distinction of whether the municipality must choose by ordinance or by referendum is not fatal to the analogy. In either case, the legislature has chosen to permit the municipality itself to determine whether the activity needs to be regulated. A municipality might not see any need to require pool and billiard rooms to be licensed and thus, pool and billiard rooms could operate during any hours they chose.

Section 7105 of the Crimes Code provides the maximum regulation of pool and billiard rooms that a municipality could establish while being consistent with appellants' right to operate a pool and billiard room. We find the legislature's delegation of this police power previously limited to only cities of the first class to be reasonable since it permits all municipalities in this Commonwealth to minimally regulate this activity if the need arises. Thus we hold that section 7105 is not violative of the Equal Protection clauses of either the United States or Pennsylvania Constitutions.

Appellants also argue that section 7105 violates the Due Process Clause of the United States Constitution. However, appellants erroneously premise this argument on that portion of section 7105 which closed pool and billiard rooms on Sundays

which had been suspended by 4 P.S. §40.1 prior to Kroger. Section 40.1 suspended section 7105 only in so far as it prohibited the operation of pool and billiard rooms on Sundays. We therefore find this argument to be without merit.

For all of the aforementioned reasons, we hold that section 7105 of the Crimes Code is constitutional.

Affirmed

FOOTNOTES

1 Failure to notify the Attorney General under Pa.R.A.P. 521(a) that an appellant challenges the constitutionality of a statute has been held to be a waiver of that issue. Commonwealth v. Duncan, 279 Pa. Super. 395, 421 A.2d 257 (1980); Commonwealth v. Ashford, 268 Pa. Super. 225, 407 A.2d 1328 (1979). But in the interest of judicial economy and since the plain language of Rule 521(a) excludes its effect where the Commonwealth is a party, the recent policy of this court has been to dispose of these issues on the merits. Commonwealth v. Koch, 288 Pa. Super. 290, 431 A.2d 1052 (1981); Commonwealth v. Linder, 284 Pa. Super. 327, ____ n.4, 425 A.2d 1126, 1129 .4 (1981).

2 4 P.S. §40.1 suspended those portions of section 7105 which regulated the Sunday hours of pool and billiard rooms prior to Kroger Co. v. O'Hara Township et al., 481 Pa. 101, 392 A.2d 266 (1978).

3 Except Sunday, See footnote 2, supra.